IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 654 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHANKARLAL M. PARMAR - Applicant(s)
Versus
DINESH BABULAL BORIYAWALA & 1 - Respondent(s)

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Appearance :
MR TS NANAVATI for Applicant(s) : 1,
None for Respondent(s) : 1,
MR AJ DESAI, APP for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 13/10/2006

ORAL JUDGMENT

1. The applicant-accused is before this Court being aggrieved by the judgment and order passed by the 8th Additional Judicial Magistrate First Class, Bharuch in Criminal Case No. 12158 of 2005, which is confirmed in Criminal Appeal No. 53 of 2006 by the

learned Additional Sessions Judge, Fast Track Court No.5, Bharuch.

2. The facts of the case are that original accused No.1 had given two cheques to the complainant and when those cheques were deposited by the complainant in the bank, the same were dishonoured. The complainant issued notice dated 29.7.2005 and as the applicant-original accused did not pay that amount, he filed Criminal Case No. 12158 of 2005.

2.1. The case of the complainant is that, he is serving in the L.I.C. and the accused is working as an agent of the L.I.C. They both were known to each other and had good relation. The accused was in need of money for his business purpose. He demanded Rs. two lakhs. The complainant paid Rs. 2 lakhs to the accused. The accused gave two cheques to the complainant on 15.7.2005. These cheques were deposited in the bank by the complainant on 25.7.2005, the same were dishonoured and returned on 26.7.2005 with an endorsement 'Insufficient Fund'. The complainant learnt about the same on 27.7.2005. He gave notice on 29.7.2005, which was served to the accused-applicant herein on 4.8.2005. As the applicant-accused did not pay the amount, the complaint was filed.

2.2. The learned 8th Additional Judicial Magistrate First Class, Bharuch, taking into consideration the rival contentions of the parties, recorded the

conviction and awarded six months' simple imprisonment, fine of Rs. 5,000/- and in default, further two months' simple imprisonment. The learned JMFC also ordered that the accused shall pay a sum of Rs. two lakhs within 60 days from the date of the order to the complainant under Section 357 of the Code of Criminal Procedure.

2.3. Various contentions were raised before the learned JMFC on behalf of the accused in written submissions filed at Exh. 42. One of the contentions was that there being difference in the signature in the cheque and the name of the accused in the complaint, no offence is made out against the accused. The next and the main contention raised by the applicant-accused is that he is working as an agent in the L.I.C. and, in that business, he does not need any money and, therefore, the reason, which is put forward by the complainant in the complaint that the amount was demanded by the accused, 'for the business purpose' is not correct and, therefore, the entire transaction should be disbelieved.

2.4. The learned J.M.F.C. has recorded in para 7 that, 'the accused has not challenged the factum of the cheques being given to the complainant'. The learned J.M.F.C. has also recorded that, 'the accused has not explained as to under what circumstances, he had given the cheques to the complainant' and, therefore, he has drawn a conclusion that cheques, Exhs. 15 and 16, were given by the accused towards

the discharge of his lawful debt to the complainant.

3. On perusal of the judgment and order of the learned J.M.F.C., it can be noticed that all possible contentions were raised by the accused, but the same were found without any substance. The accused had contended that the 'amount' in the cheques is written in English, whereas the other details are in 'Hindi'; that the cheques are not answering the requirement of Section 6 of the Negotiable Instruments Act; that there is a scribbling in the cheques and that scribbling is not authenticated by short signature and, therefore, the cheques are defective and hence, no steps can be taken based on these cheques; that the cheques do not bear any stamp of the bank and, therefore, it cannot be believed that these cheques had gone in the 'clearing'; that the benefit of doubt should be given to the accused and he should be acquitted of the charge levelled against him.

Perusal of all these contentions and the defences put forward by the accused clearly indicate that he is trying to make out a defence at any cost but, then, the learned J.M.F.C. was not convinced of any of the grounds and hence, rejected those defence and convicted the applicant-accused.

4. The accused, being aggrieved by the judgment and order of the learned J.M.F.C., preferred Criminal Appeal No. 53 of 2006. The learned Additional Sessions Judge, Fast Track Court No.5, Bharuch

considered the rival contentions of the parties, and the decision cited before him. The learned Judge was also not convinced of the contentions raised before him on behalf of the appellant-applicant- original accused and, therefore, rejected the appeal.

5. Before this Court, the learned advocate appearing for the applicant, took time to supply the typed copies of the relevant evidence before making his submissions so as to rely on the same.

The learned advocate made available the copy of the complaint, xerox copy of the cheques, pay in slip, xerox copy of the memo with which the cheques were returned, copy of notice dated 29.7.2005, copy of the acknowledgment receipts, copy of the affidavit of the complainant, copy of the deposition of the complainant, copy of the deposition of PW-3 Exh.34 Devsinh Dhanabhai Katara, copy of deposition of PW-2, Exh.27 Jashwantbhai Kalidas Vasava.

6. The learned advocate invited attention of the Court to all these documents, at length. He emphatically submitted that the cheques bear 'rubber stamp' of the 'date'. He submitted that so far as the 'amount' in figure is concerned, it is mentioned in English, whereas the other details, like 'name of the complainant', 'amount in words' and 'endorsement of Account Payee', are in 'Hindi' and the signature is also in 'Hindi'. He submitted that this is sufficient to hold that the cheques were not issued

by the accused.

Merely because the aforesaid facts exist, it cannot be held that the cheques are not issued by the Accused. This submission is contradictory to other submissions.

7. The learned advocate for the applicant herein next submitted that, 'the complainant is serving in the L.I.C.' and his income is known, therefore, he ought to have been asked by the learned J.M.F.C. and the learned Additional Sessions Judge to disclose his source of having this money to the satisfaction of the Court on the date on which it is stated by the complainant that he advanced the amount of Rs. two lakhs to the accused. It is to return this amount, the accused gave these two cheques. It is submitted that unless the complainant was able to convincingly disclose his source of having that fund, the learned Judge ought not to have accepted the case of the complainant.

8. The learned advocate for the applicant did not point cite any decision in support of his submission aforesaid. In a case under Section 138 of the Negotiable Instruments Act, the law does not require a disclosure of the source from which the complainant had come in possession of the money advanced.

At one stage, the learned advocate for the

applicant submitted that, in a way, the complainant is a public servant, serving in a Public Sector Corporation and he cannot have a sum of Rs. two lakhs. Therefore, it is obligatory on the part of the complainant to disclose his source from which he possessed this money to the Court. On the short ground of non-disclosure, the complaint ought to have been dismissed and the accused ought to have been discharged of the charges levelled against him.

9. The learned advocate is not able to support this submission by any decision either of the Hon'ble the Apex Court or this Court. Having given considered thought to the matter, the Court finds no substance in the matter. Hence, the Criminal Revision Application is dismissed.

10. At this juncture, after this order is dictated, learned advocate Mr. Nanavati for the applicant submitted that the judgment and order passed by learned J.M.F.C. confirmed in appeal is not sustainable in view of the fact that the learned Judicial Magistrate First Class has imposed sentence of simple imprisonment of six months, fine of Rs. 5,000/- and, in default, two months' simple imprisonment. Besides, he has also ordered the accused to pay a sum of Rs. two lakhs, i.e. the amount of the cheque, within 60 days from the date of the order under Section 357 of the Code of Criminal Procedure.

The learned advocate for the applicant invited attention of the Court to subsection (3) of Section 357 of the Code of Criminal Procedure, which reads as under:

> **“357. Order to pay compensation.-**
> **(3)** When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order of the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.”

The learned advocate submitted that subsection (3) empowers the Court to award compensation only in the cases in which sentence imposed by the Court is such, 'of which fine does not form a part'. He submitted that, therefore, in the cases where the Court has imposed a 'sentence of which fine is a part', the Court cannot order payment of compensation.

The learned advocate submitted that to put it differently, the order of the learned Judicial Magistrate First Class is required to be interfered with in this Revision Application inasmuch as, on one hand it imposes fine of Rs. 5,000/- with sentence for imprisonment and on the other, it orders payment of compensation. He submitted that both these things

cannot go together.

11. Learned advocate Mr. Nanavati relied upon a decision of the Hon'ble the Apex Court in the matter of *Sivasuriyan Vs. Thangavelu* reported in *(2004) 13 Supreme Court Cases 795*. He submitted that the Hon'ble the Apex Court has observed in para 5 as under:

> "5. On a plain reading of the aforesaid provision, it is crystal clear that the power can be exercised only when the Court imposes sentence by which fine does not form a part. In the case in hand, a court having sentenced to imprisonment, as also fine, the power under sub-section (3) of Section 357 could not have been exercised. In that view of the matter, the impugned direction of the High Court directing payment of compensation to the tune of Rs one lakh by the appellant is set aside."

12. Mr. A.J. Desai, learned APP, appearing for the State, submitted that Section 357 of the Cr.P.C. provides for passing of an order to pay compensation. He submitted that in Section 357, in its various subsections, various situations are contemplated and provided for. He submitted that under subsection (1) of Section 357, 'when a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, a Court may order the whole or any part of the fine recovered to be applied', for

various purposes set out in Clause (a) to (d). He submitted that subsection (1) of Section 357 operates when the learned Judge does not propose to order for payment of compensation over and above the sentence of imprisonment and fine. He submitted that, in such cases, the learned J.M.F.C. or, for that reason the Appellate Court as well, may award compensation out of the 'amount imposed as fine'.

He submitted that it is not that, 'subsection (1) and subsection (3) cannot go together'. He submitted that, in fact, 'the imprisonment and fine' awarded as sentence is for the 'wrong' done by accused. He submitted that, subsection (3) operates independent of that and in addition to the fine imposed, the Court can always order the payment of compensation.

13. Mr. A.J. Desai, learned APP, in support of his submissions, relied upon a decision of the Hon'ble the Apex Court in the matter of 'Hari Kishan and State of Haryana Vs. Sukhbir Singh and others' reported in AIR 1988 Supreme Court 2127. He submitted that he finds support to his submissions from the observations of the Hon'ble the Apex Court made in para 10, which reads as under :

> “10. Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with

sub-section (1). We are concerned only with sub-section (3). It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation **is not ancillary** to other sentences but it is **in addition thereto**. This power was intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach of crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way."

Mr. A.J. Desai, learned APP, strenuously submitted that, 'the Hon'ble the Apex Court has said that subsection (3) is not ancillary to subsection (1) of Section 357'. He submitted that the Hon'ble the Apex Court has said, in no uncertain terms, that, 'subsection (3) is **in addition thereto**'. He submitted that it is a matter known to everyone that, 'the power to impose fine has inbuilt limitations. Like in

the present case, the power to impose fine, available to a Court of J.M.F.C., is 'Rs. 5,000/-' only. That being so, in a case of dishonour of cheque under Section 138 of the Negotiable Instruments Act, where the amount of cheque could be anything as in the present case, it is Rs. two lakhs, awarding the entire amount of fine as compensation may also not be enough to do justice to the victim and, therefore, in such cases, the learned J.M.F.C. is expected to and, in the present case, the learned J.M.F.C. has rightly done so, has awarded compensation under subsection (3) of Section 357. He submitted that merely because the learned J.M.F.C. has recorded conviction and sentenced the accused, with imprisonment and fine both, subsection (3) does not become redundant.

14. In the alternative, the learned APP Mr. A.J. Desai submitted that, as was done by the Hon'ble the Apex Court in the case *Pankajbhai Nagjibhai Patel Vs. State of Gujarat* reported in *AIR 2001 SC 567*, a similar order can be passed, which will take care of the situation.

The learned APP invited attention to the facts of the case, which are set out in para 2 of the judgment, which is reproduced for ready perusal:

> “2. A Judicial Magistrate of first class, after convicting an accused of the offence under Section 138 of the Negotiable Instruments Act (for short, 'the NI Act') sentenced him to

imprisonment for six months and a fine of Rs. 83,000/-. The conviction and sentence were confirmed by the Sessions Judge in appeal and the revision filed by the convicted person was dismissed by the High Court. When the special leave petition was moved, learned counsel confined his contention to the question whether a Judicial Magistrate of first class could have imposed a sentence of fine beyond Rs. 5,000/- in view of the limitation contained in Section 29(2) of the Code of Criminal Procedure (for short 'the Code'). As the decision of this Court in K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510 : (1999 AIR SCW 3809 : AIR 1999 SC 3762 : 1999 Cri LJ 4606) is in support of the said contention we issued notice to the respondent mentioning that it is limited to the question of sentence. Learned counsel for the respondent contended that the decision of this Court to the effect that power of the Judicial Magistrate of first class is limited in the matter of imposing a sentence of fine of Rs. 5000/- is not correct in view of the non-obstante clause contained in Section 142 of the N.I. Act. We, therefore, heard both counsel on that aspect.”

In the facts and circumstances, the Hon'ble the Apex Court in para 16 observed as under:

“16. If proceedings are so submitted to the

Chief Judicial Magistrate under Section 325(1) of the Code it is for the Chief Judicial Magistrate to pass such judgment, sentence or order in the case, as he thinks fit. It is so provided in sub-section (3) thereof.

Even that apart, a Magistrate who thinks it fit that the complainant must be compensated with his loss he can resort to the course indicated in Section 357 of the Code. This aspect has been dealt with in Bhaskaran's case (supra) as follows:

"However, the Magistrate in such cases can alleviate the grievance of the complainant by making resort to Section 357(3) of the Code. It is well to remember that this Court has emphasised the need for making liberal use of that provision (Hari Singh v. Sukhbir Singh, 1988 (4) SCC 551). No limit is mentioned in the sub-section and therefore, a Magistrate can award any sum as compensation. Of course while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a Court of Magistrate of the first class in respect of a cheque which covers an amount exceeding Rs. 5000/- the Court has power to award compensation to be paid to the complainant."

After so observing, the the Hon'ble the Apex Court passed the following order :

> “18. In the result, while retaining the sentence of imprisonment of six months we delete the fine portion from the sentence and direct the appellant to pay compensation of Rs. 83,000/- to the respondent-complainant. The said amount shall be deposited with the trial Court within six months failing which the trial Court shall resorted to the steps permitted by law to realise it from the appellant.”

The learned APP submitted that a similar order will meet the ends of justice.

15. In the result, this Revision Application is partly allowed. The order passed by the 8th Additional Judicial Magistrate First Class, Bharuch dated 7.6.2006 in Criminal Case No. 12158 of 2005, confirmed by the learned Additional Sessions Judge, Fast Track Court No.5, Bharuch in Criminal Appeal No. 53 of 2006, is modified to the extent that fine part is deleted from the sentence. However, the direction to pay compensation of Rs. two lakhs within a period of 60 days is upheld. However, period of 60 days is extended for two months from the date of the receipt of this order.

Sd/-

(RAVI R. TRIPATHI, J.)

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